

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

PREMIER HOTEL DEVELOPMENT
GROUP d/b/a Hospitality
Consultants, The Carnegie
Hotel, Austin Spring Spa
& Salon, and Luigies
EID 62-1761567 and 52-2261913;
PREMIER INVESTMENT GROUP
d/b/a Premier Investments
EID 62-1721108; and
SAMUEL T. EASLEY
SS 415-23-3809,

Debtors.

Nos. 01-20923, 01-20940
and 01-20922
Jointly Administered
Chapter 11

SAMUEL T. EASLEY and WAYNE
WALLS, Liquidating Trustee,

Plaintiffs,

vs.

Adv. Pro. No. 02-2024

FIRST TENNESSEE BANK,

Defendant.

M E M O R A N D U M

APPEARANCES :

JAMES R. KELLEY, ESQ.
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-and-

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court on the plaintiffs' motion for summary judgment on their complaint to avoid the defendant's alleged unperfected security interest in a federal income tax refund. Because a tax refund is a "general intangible" perfected by the filing of a UCC-1 financing statement and the defendant admitted in its answer that no financing statement was filed, the defendant's security interest is avoidable under 11 U.S.C. § 544(a). Accordingly, the summary judgment motion will be granted. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(A),(E) and (K).

I.

An order confirming the third modified plan and second amendment thereto of debtors Premier Hotel Development Group, Premier Investment Group and Samuel T. Easley was entered in the underlying bankruptcy case on December 12, 2001. Amended

Article VIII of the plan provides:

All avoidance actions under Sections 547, 548, 549 and 550 and all rights under Section 544 of the Bankruptcy Code will be transferred to the Liquidating Trust. In particular, some creditors have raised the question of the perfection of First Tennessee in the income tax refund. The liquidating trustee will investigate this issue, hold the tax refund pending a resolution and will have the power to initiate an action in the Bankruptcy Court to recover such amounts as may be determined by the Bankruptcy Court.

Pursuant to this plan provision, debtor Samuel Easley filed a complaint initiating this adversary proceeding on April 12, 2002. According to the complaint, defendant First Tennessee Bank National Association claims a security interest in a federal tax refund payable to Mr. Easley, which is property of the estate. The tax refund is in the approximate amount of \$500,000 and is presently being held by the liquidating trustee.

The complaint recites that although Mr. Easley signed a security agreement granting First Tennessee a security interest in the tax refund, he did not sign and First Tennessee did not file a UCC-1 financing statement with respect to the tax refund. Mr. Easley asserts that because a tax refund is a general intangible, the claimed lien of First Tennessee is unperfected and may be avoided by him under § 544(a) of the Bankruptcy Code. Mr. Easley prays that the court "determine that the rights of the Debtor and the estate as a judgment lien creditor under § 544 of the Bankruptcy Code are superior to the rights of First

Tennessee as an unperfected secured creditor in the tax refund [and] order that the tax refund ... be made available to the creditors of Mr. Easley's estate to be distributed in accordance with his Plan free from the security interest of First Tennessee." By agreed order entered July 24, 2002, Wayne Walls, the liquidating trustee under the plan, was added as an additional party plaintiff.

In its answer filed on August 7, 2002, First Tennessee admits that the income tax refund is property of the estate and that "it [did] not file a UCC-1 financing statement with respect to the Tax Refund." First Tennessee, however, denies that the plaintiffs are entitled to relief.

The plaintiffs filed the present summary judgment motion along with a memorandum in support on October 15, 2002. Pursuant to E.D. Tenn. LBR 7007-1, an opposing party has twenty days in which to respond to a motion filed in an adversary proceeding. This rule further provides that "[a] failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion." Notwithstanding that more than thirty days have passed since plaintiffs moved for summary judgment, First Tennessee has not filed a response.

II.

Rule 56 of the Federal Rules of Civil Procedure, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "When reviewing a motion for summary judgment, the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party." *Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (6th Cir. 2001)(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). To prevail, the nonmovant must show sufficient evidence to create a genuine issue of material fact and from which the court could reasonably find for the nonmovant. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). "Entry of summary judgment is appropriate 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986)). In other words, a nonmoving party has the affirmative duty to

direct the court's attention to specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Id.* See also *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). Because First Tennessee has not responded to the plaintiffs' summary judgment motion, the only issue is whether the undisputed facts entitle the plaintiffs to judgment as a matter of law. See Fed. R. Civ. P. 56(e) ("If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."); *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404 n.5 (6th Cir. 1992)(citing *Littlejohn v. Larson*, 891 F.2d 291 (6th Cir. Dec. 6, 1989)(summary judgment was proper where plaintiff failed to respond to defendant's motion for summary judgment and therefore no genuine issue of material fact existed)).

III.

The consensus among the courts which have considered this issue is that a tax refund constitutes a "general intangible" under Article 9 of the Uniform Commercial Code. See, e.g., *Sterling Nat'l Bank & Trust Co. of New York v. Bornstein (In re Metric Metals Int'l, Inc.)*, 20 B.R. 633, 636 (S.D.N.Y. 1981)(anticipated income tax refund constitutes a general intangible); *Brandt v. Fleet Capital Corp. (In re TMCI*

Electronics), 279 B.R. 552, 555 (Bankr. C.D. Cal. 1999)("It is well-accepted that the right to receive a tax refund constitutes a 'general intangible.'"); *Sacramento Real Estate Corp. v. First Chicago Bank (In re Sacramento Real Estate Corp.)*, 201 B.R. 225, 231 (Bankr. N.D. Ill. 1996)("The right to receive a tax refund is a general intangible."); *In re Castle Ventures, Ltd.*, 167 B.R. 758, 764 (Bankr. E.D.N.Y. 1994)(tax refunds are general intangibles); *Matter of Don Connolly Constr. Co.*, 110 B.R. 976, 978 (Bankr. M.D. Fla. 1990)(right to receive refund of overpaid payroll taxes constitutes a general intangible); *Lazere Fin. Corp. v. Palmetto Pump & Irrigation, Inc. (In re Palmetto Pump & Irrigation, Inc.)*, 81 B.R. 109, 111 (Bankr. M.D. Fla. 1987)("It is now well established that the right to receive a tax refund ... [is a] general intangible[.]"); *In re American Home Furnishings Corp.*, 48 B.R. 905, (Bankr. W.D. Wash. 1985)(tax refunds are general intangibles, not contract rights); *Markowitz v. Heritage Bank, N.A. (Matter of Jefferson Mortgage Co.)*, 25 B.R. 963, 967 (Bankr. D.N.J. 1982)(tax refund may be categorized as a general intangible); *In re Kendrick & King Lumber, Inc.*, 14 B.R. 764, 766 (Bankr. W.D. Okla. 1981)(security interest in tax refund attached between the parties because it contained the term "general intangible," but interest was

unperfected because financing statement failed to include such term); *In re Certified Packing, Inc.*, 1970 WL 12619, 8 UCC Rep. Serv. 95 (D. Utah Jan. 29, 1970)(same). See also TENN. CODE ANN. § 47-9-106 (1996)("General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money."). A security interest in a general intangible is perfected by the filing of a UCC-1 financing statement. See TENN. CODE ANN. § 47-9-310(a)("General rule: perfection by filing. Except as otherwise provided in subsection (b) and § 47-9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.").

Because First Tennessee did not file a UCC-1 financing statement in order to perfect the tax refund at issue herein, its security interest in the tax refund remains unperfected and subject to avoidance by the liquidating trustee as a hypothetical judgment lien creditor under the powers granted him by 11 U.S.C. § 544(a). See *In re Castle Ventures, Ltd.*, 167 B.R. at 765. There being no dispute of material fact and the court having concluded that plaintiffs are entitled to a judgment as a matter of law, the plaintiffs' motion for summary judgment will be granted. Under 11 U.S.C. § 551, the avoided

lien is preserved for the benefit of the estate. An order will be entered to this effect avoiding First Tennessee's security interest in the tax refund.

ENTER: November 22, 2002

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE